Ministerial responses — Report 1 of 2022[1]

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The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-039178

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Chair

I refer to your correspondence of 25 November 2021 on behalf of the Parliamentary Joint Committee on Human Rights concerning the Aged Care and Other Legislation Amendment (Royal Commission Response No.2) Bill 2021(Bill).

I have responded to the issues raised in the Human Rights Scrutiny Report 14 of 2021 (Scrutiny Report), dated 24 November 2021.

As stated in the Scrutiny Report, Schedule 9 of the Bill seeks to allow the Quality of Care Principles 2014 (Quality of Care Principles) to make provisions for persons or bodies who may give informed consent to the use of a restrictive practice on a person in residential aged care, if that person lacks capacity to give consent. The amendments also provide that if such consent was given and the restrictive practice was used in approved circumstances, then the aged care provider or staff member who used the restrictive practice will be immune from any civil or criminal liability in respect of the use of the restrictive practice. Please see details below in response to the issues raised in the Scrutiny Report.

It is important to highlight that these amendments follow the significant legislative reform which introduced strengthened legislation on the use of restrictive practices from 1 July 2021. These amendments are a part of the continued commitment from the Commonwealth to lead work on this matter and follow subsequent identification of gaps in state and territory legislation. These amendments are only to provide an interim solution to allow time for states and territories to amend their legislation and address any gaps that exist.

Compatibility with the right of persons with disabilities to enjoy legal capacity
As confirmed by the United Nations Committee on the Rights of Persons with Disabilities there can be no derogation from article 12. The amendments to Schedule 9 do not limit the right of persons with a disability to equal recognition before the law.

It is important to note that ageing is not a disability and not every care recipient in residential aged care has a disability. As such the protections offered through the legislation are afforded to care recipient's regardless of the presence of a disability.

There are significant safeguards in place in the proposed legislation, the provisions in the *Aged Care Act 1997* (Act) will be supported by amendments to the Quality of Care Principles which will stipulate that a restrictive practice may only be used in accordance with the terms of the consent that has been provided. To further protect the care recipient, a restrictive practices substitute decision-maker is only deemed necessary when the care recipient is unable to consent themselves.

The person who is given the power to consent on behalf of the care recipient as the restrictive practices substitute decision-maker, will include individuals nominated by the care recipient (when they had capacity) or otherwise must have a personal interest in the health and wellbeing of the care recipient and therefore would have an understanding of the care recipient's preference. They are also able to decline the request to be the restrictive practices substitute decision-maker if they wish.

While consent is one requirement of the use of restrictive practices, there are several additional criteria, as outlined in the Quality of Care Principles, that must be adhered to. These include:

- that the restrictive practice is only used as a last resort to prevent harm to the care recipient or others, and after consideration of the likely impact of the use of the restrictive practice on the care recipient
- to the extent possible, best practice alternative strategies have been used before the restrictive practice on the care recipient
- the alternative strategies have been documented in the behaviour support plan
- it is only used to the extent necessary and in proportion to the risk of harm to the care recipient or others
- the use of the restrictive practice complies with any provisions outlined in the care recipient's behaviour support plan
- the use of the restrictive practice complies with the Aged Care Quality Standards
- the use of the restrictive practice is not inconsistent with the Charter of Aged Care rights set out in the User Rights Principles 2014
- that the use of the restrictive practices meets requirements (if any) of the law of the state or territory the restrictive practice is used.

Necessity and appropriateness of providing immunity

The immunity provision (proposed new section 54–11 of the Act) which provides immunity from civil or criminal liability only applies where consent was given to the use by a person authorised to provide consent under the Commonwealth laws, and the use was in alignment with all other requirements under the Quality of Care Principles.

To ensure the immunity applies appropriately, these provisions will be supported by amendments to the Quality of Care Principles, stipulating that a restrictive practice may only be used in accordance with the terms of the consent that has been provided (such as the particular type of restrictive practice, for the time specified). This will mean that if, for example, consent is given to the use of a nominated restrictive practice for a particular period of time and it is used for longer than that specified period, it will not have been used in the circumstances set out in the Quality of Care Principles, and therefore those involved will not be able to rely on the immunity in this provision.

Appropriateness of immunity for the use of restrictive practices on persons without capacity

If a jurisdiction's laws provide authority for a person or body to consent to the use of restrictive practices, this immunity does not apply. The immunity will only apply in circumstances where the Commonwealth law authorises a person or body to consent to the use of restrictive practices, because the state and territory arrangements do not otherwise provide for this consent to be given.

As the proposed consent arrangements will result in an approved provider relying on consent by a person or body authorised to give that consent under the Commonwealth's aged care laws, rather than under the laws of the relevant state or territory, this will ensure that approved providers and relevant individuals working with them (such as staff members, volunteers and medical practitioners) are not open to any civil or criminal liability when restrictive practices are used. A condition of the immunity is that the use must also be used in compliance with all the additional criteria introduced through the strengthened requirements on the use of restrictive practices (listed on previous page).

As noted in the Bill's revised explanatory memorandum, it is also proposed that as part of the planned amendments to the Quality of Care Principles, clarifications will also be made to ensure that a restrictive practice may only be used in accordance with the consent that has been provided (such as the particular type of restrictive practice and for the time specified). This will mean that if, for example, the restrictive practices substitute decision-maker has consented to the use of bed rails between 10:00pm and 7:00am on weekdays, and the approved provider uses the bedrails outside the specified period, the restrictive practices will not have been used in accordance with the consent, and therefore in compliance with the requirements under the Quality of Care Principles, meaning those involved will not be able to rely on the immunity in this provision.

In the situation where a care recipient is unable to consent to the use of restrictive practices themselves and the provider is relying on the consent from a restrictive practices substitute decision-maker as set out by Commonwealth law, it is important that they are protected from liability should the decision be taken to court. Providing that the aged care provider and or staff meet all the requirements as set out in the Quality of Care Principles they should be able to rely on the consent of the substitute decision maker without fear of persecution. If an individual can consent themselves there is no requirement of immunity for the provider or staff as they will be relying on the direct consent from the individual and should not be exempt from criminal and civil liability should they use a restrictive practice inconsistently with the consent and the requirements as set out in the Quality of Care Principles.

Substitute or supported decision maker

It is acknowledged that supported decision-making is a best practice approach and would provide greater protections for consumers. However, the Australian Government is implementing this interim solution as quickly as possible, in acknowledgment of the time it may take state and territory governments to be able to address limitations in their laws.

As such, the Government acknowledges that the interim solution is the most practical approach and will continue to encourage state and territory governments to ensure there are rigorous protections at the jurisdictional level across the nation.

The interim solution will only apply in circumstances where a consumer does not have capacity to be able to provide consent. In these circumstances a supported decision-making model would not be appropriate. When a care recipient has capacity, they will be able to provide consent to the use of restrictive practices.

It is also proposed that the interim solution will involve arrangements where, while a consumer has capacity to do so, they would be able to nominate a person or body in writing who would be able to provide consent to restrictive practices on their behalf, if they later did not have capacity.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

cc: Senator the Hon Richard Colbeck, Minister for Senior Australians and Aged Care Services